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SANITARY LEGISLATION.

COURT DECISIONS.

NEW YORK COURT OF APPEALS.

Penalty for Violation of Order of Board of Health—Must be Determined when Order is Made.

VILLAGE OF CARTHAGE *v.* COLLIGAN, 110 N. E. Rep., 439. (Nov. 16, 1915.)

A board of health is without power, after its order has been disobeyed, to prescribe for the first time a penalty for a wrong already done.

A State law authorized local boards of health to make general and special orders for the protection of the public health and to prescribe and impose penalties for the violation of such orders not exceeding $100. The board of health of the village of Carthage ordered the defendant not to again pump the contents of his cesspool over the ground, but they did not prescribe the penalty to be incurred if the order was violated. Defendant disobeyed the order, and then the board fixed the penalty at $50. Defendant appealed, and the court held that the board had no right after the commission of the offense, to determine what the penalty should be.

CARDOZO, J.: This is an action to recover a penalty imposed on the defendant by the board of health of the village of Carthage.

The defendant had a cesspool on his land, and emptied it in ways offensive to his neighbors. The board of health adopted a resolution that he must not again pump his cesspool over the ground, and that he must abate the existing nuisance, and the village attorney was directed to draw up a notice to that effect. No penalty was prescribed in the event of disobedience. The resolution was followed by the service of a notice which we think was sufficient in form, and which warned the defendant that he was forbidden to pump the contents of his cesspool upon the surface of the ground. The defendant disobeyed the order, and was directed to show cause why a penalty should not be imposed. He appeared before the board; a hearing followed; and a resolution was adopted that the amount of the penalty to be imposed be fixed at $50; and that it be paid forthwith. Whether the penalty is legal is the question to be determined.

By section 21 of the public health law (L. 1909, ch. 49; Cons. Laws, ch. 45) a village board of health has the power to make both general and special orders for the protection of the public health. General orders or regulations must be not only adopted, but also published. It is conceded that there are no general orders or regulations applicable to the defendant's case. Special orders, in individual cases, not of general application, may be made without publication, but must be served upon the owner. The same statute clothes the board with other powers to make its ordinances effective. It "may issue subpœnas, compel the attendance of witnesses, administer oaths to witnesses and compel them to testify, and for such purposes it shall have the same powers as a justice of the peace of the State in a civil action of which he has jurisdiction." (L. 1909, ch. 49, sec. 21.) It may also "prescribe and impose penalties for the violation of or failure to comply with any of its orders or regulations, not exceeding $100 for a single violation or failure, to be sued for and recovered by it in the name and for the benefit of the municipality; and may maintain actions in any court of competent jurisdiction to restrain by injunction such violations, or otherwise to enforce such orders and regulations."

The order directed to the defendant was not a general one. It was an order in an individual case. It did not prescribe any penalty. It simply announced a command. We think the board was without power, after the order had been disobeyed, to prescribe for the first time a penalty for a wrong already done. The statute is not mandatory, but permissive. It does not require the board to prescribe any penalty whatever. It merely authorizes the board to prescribe one. If the board had "prescribed" a penalty in advance of the offense, it might have "imposed" the penalty after the offense. Even then, its finding that the offense had been committed would be subject, of course, to reexamination by the courts. (People ex. rel. Copcutt *v.* Board of Health, 140 N. Y., 1; 35 N. E., 320; 23 L. R. A., 481; 37 Am. St. Rep., 522.) We do not say that it was bound in advance of the event to make the penalty a fixed one. (Dillon, Municipal Corporations, vol. 2, secs. 608, 613; City of Poughkeepsie *v.* Ring, 38 App. Div., 610; 57 N. Y. Supp., 116.) Following the words of the statute, it might prescribe by its order a penalty not exceeding $100, and then take heed of circumstances aggravating or mitigating the offense in imposing the penalty up to the maximum prescribed. But the difficulty in this case is that not till after the event did the board give notice to the defendant that he would be subjected to any penalty whatever. It is usual to authorize boards of aldermen and other local bodies when adopting ordinances to prescribe penalties within stated limits. But if they adopt an ordinance without a penalty they may not affix one thereafter so as to cover past offenses. The lack of power is, of course, the same whether the ordinance is general or special. A different situation would be here if the legislature had said that there must be no ordinance without a penalty. In such a case, a penalty, not exceeding the prescribed maximum, might automatically attach. But that is not the case before us. The board may abate this nuisance. It may enjoin the violation of its order. It may even prescribe a penalty if the violation is continued. But for past offenses there is no penalty, for none has been prescribed.

The judgment should be affirmed, with costs.

Willard Bartlett, C. J., and Hiscock, Collin, Hogan, and Pound, JJ., concur. Seabury, J., dissents on dissenting opinion of Krause, P. J., below.